NO. 21387

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALETA G. COSTEN, et al.,

Appellants,

vs.

PAULINE'S SPORTSWEAR, INC., et al.,

Appellees.

APPELLEES' REPLY BRIEF

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THOMAS H. GREENWALD

315 South Beverly Drive
Beverly Hills, California 90212

Attorney for Appellees

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STATEMENT OF THE CASE

The five plaintiff-appellants initially filed a complaint on May 28, 1965 alleging, in substance, four counts of violations of the Sherman Act, Sections 1 and 2, and the Clayton Act, Section 3. Defendant Pauline's Sportswear, Inc. and its principal officers, Robert C. Abild and Desda S. Abild, having been served, filed three motions, to wit: to dismiss the action on grounds of venue, to dismiss the action because it fails to state a claim against these defendants, and to require plaintiffs to file a more definite statement [R. p. 29, ff]. The defendant, Regal Accessories of New York, was never served and did not appear in said action. In the

uncontroverted affidavit in support of the motions to dismiss [R. p. 31, ff.], it was established that defendant Pauline's Sportswear, Inc. was in the business of merchandising ladies' clothing (sportswear) in sales volume of less than $1 million per annum; and, that it was not engaged in interstate commerce during the times referred to in the complaint -- all of its franchises being in California -- and engaged in a business that has nationwide sales, of at least, in excess of $100 million. (The $100 million figure was obviously conservative, in that ladies' ready-to-wear business is approximately $1 billion per year, or more than 10,000 times the sales volume of appellees.)

The general business of the corporation was the setting up of retail franchises within certain territorial limits, and supplying them exclusively with ladies' sportswear -- blouses, pants, capris, shorts, jamaica sets, etc. -- to sell for $1, $2 and $3 at retail. Appellees bought merchandise from the named defendant, Regal Accessories, and others in the ordinary course of business.

All of the plaintiffs sought out the defendant Pauline's Sportswear and voluntarily signed the franchise agreement and sublease sued upon; and, they had closed their stores prior to the institution of the within litigation.

The motion to dismiss was granted [R. 93] with, among other things, the enunciation by the court that the commodities were in fair and open competition with other commodities of the same general class [R. 94; 2] and within the provisions of the California Business and Professions Code, Section 16902 (a).

The first amended complaint [R. 114, ff.] subsequently filed merely restated the second, third and fourth causes of action as to all of the plaintiffs in substantially the same form and substance as the original complaint (without regard to defendant's demand under Rule 12(e) for a more definite statement [R. 51; 14, ff.] which was filed concurrently with the original motion to dismiss). Again, a motion to dismiss was made upon the grounds that the complaint failed to state a cause of action, and was granted as to the amended complaint [R. 153]. At no time did plaintiffs cause to be filed any (counter) affidavits or additional basis for its complaint or amended complaint; nor, did they attempt to file a (third) amended complaint, which filing was not prohibited by the District Court decision. They have elected to stand on the first amended complaint.

ARGUMENT

I

DISMISSAL OF THE CLAIMS AT THE PLEADING STAGE WAS PROPER.

Appellants' first argument questions whether franchising arrangements should generally be considered exempt from the anti-trust laws; and, whether a complaint based on illegal franchising can be disposed of at the pleading stage.

It has been repeatedly held that franchising arrangements generally do not constitute a violation of anti-trust laws. It is the

exception when a franchise arrangement may constitute a violation. More important, however, the franchise is not a proper party to question the validity of a franchise arrangement.

A contract by which a manufacturing company, whose products are sold in interstate commerce, makes another sole agent for the sale of its products, is not in violation of this Section (15 U.S.C. 1, et seq.) as in restraint of interstate commerce, its effect on such commerce, if any, being indirect and incidental. Virtue v. Creamery Package Manufacturing Co., 227 U.S. 8, 57 L.Ed. 393 (Minn. 1913).

The mere fact that other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal, since it is the essential nature of the arrangement. The mere agreement between a manufacturer and a dealer to grant an exclusive dealership, i.e., the appointment of an exclusive selling agent, is not a violation of any rights (of third persons) under this Section. Baran v. Goodyear Tire and Rubber Co., 256 Fed. 571 (N.Y. 1919); Susser v. Carvel (D.C. N.Y. 1962), 206 F.Supp. 636.

There are innumerable cases supporting the proposition that exclusive dealership and exclusive territorial rights granted by a manufacturer or supplier to a retail outlet to the exclusion of competition, are nonviolative of the anti-trust sections, viz: a soft drink bottler refusing to sell its product (to plaintiff) in Brosious v. Pepsi Cola Co. (D.C. Penn. 1945), 59 F. Supp. 429, affirmed 155 F. 2d 99. Broxham v. Bordens Farm Products of

Illinois (C.C.A. Ill. 1931), 53 F.2d 946 -- holding that the agreement not to engage in milk and ice cream business within the City of Chicago or 50 miles of the city limits for a period of five years was not an unreasonable extensive as to time or territory. To the same effect: United Lens Corp. v. Dory Lamp Co., 93 F.2d 969; and in Davidson v. Kansas City Star Co. (D.C. Mo. 1962), 202 F. Supp. 613 -- a contract whereby plaintiff purchased defendant's newspapers at wholesale for the purpose of selling them at retail and promising not to sell any other newspaper except plaintiff's, was not violative of the Sections.

It is established that the anti-trust laws were not intended to condemn any and all acts or practices which might have the effect of restricting competition; acts which only incidentally or indirectly restrict competition, where their principal purpose and effect is reasonable advancement of legitimate purposes, are not prohibited. John Wright and Assoc., Inc. v. Allrick (D.C. Minn. 1962), 203 F. Supp. 744.

These Sections are not intended to reach the normal and usual contracts or combinations which are incidental to lawful purposes, and are intended to further legitimate trade, nor are they intended to inhibit intelligent conducting of business operations. Roofire Alarm Co. v. Royal Indemnity Co. (D.C. Tenn. 1962), 202 F. Supp. 166. Only such contracts and combinations as by reason of intent or inherent nature of contemplated acts prejudice public interest by unduly restricting competition or unduly obstructing the course of trade are prohibited by Sections 1 to 7 and 12 to

27 of Title 15. Said Sections were intended to preserve competition, not to prevent injury to an individual. Admiral Theater Corp. v. Paramount Films (D.C. Neb. 1956), 140 F. Supp. 636. The court said in United States v. U. S. Steel Corp. (1924), 251 U.S. 417, 40 S. Ct. 293, that the Section is not directed against a mere expectation of monopoly but against its realization. Franchises have been developed to meet the distinct needs of manufactured products. . . . The dealer must make a considerable investment with uncertain results; the contracts are entered into in good faith by both parties and utilized by businessmen, and must be given a construction in accordance with the intent of the parties. (To the same effect: Imperial Refining v. Kanotex Refining Co., 29 F.2d 193 [8th Cir. 1928].)

Again, in United States v. Swift & Co. (1943), 52 F. Supp. 476, the court held that the mere fact that parties to an agreement thereby eliminate competition among themselves is insufficient to condemn as a violation of Sections 1 to 7 of this Title, if they must still seek competition in a fair market and neither seek nor are able to effect domination of prices. It is clear in the instant case that appellants do not (and cannot) allege a domination of prices by appellees, or the lack of a competitive, free, fair market.

It is axiomatic that in order to recover damages under the anti-trust sections, the effect on interstate commerce must be direct and not remote and must be the result of intent to restrain interstate commerce. There must be substantial and actual restraint of interstate commerce, and any conspiracy which only

indirectly or incidentally affects and restrains interstate commerce is not within the purview of the Sections. Sears Roebuck Co. v. Blade (D.C. Cal. 1953), 110 F. Supp. 96, dismissed 245 F.2d 67.

It seems so obviously clear that in anti-trust matters not only must a defendant be engaged in interstate commerce, but the actions of the defendant must have a direct restraint on interstate commerce resulting in a genuine injury to the public. It is apparent that there is no more competitive industry in the country than ladies' clothing or ladies' sportswear. To single out these two virtually unknown dealers in ladies' clothing or ladies' sportswear -- one a general supplier and the other a franchise distributor -- is patently not within the purview of the anti-trust statutes, regardless of what proof could be presented at the trial, and requires a dismissal at the pleading stage.

Appellants cite the case of Hathaway Motors v. General Motors Corp., 18 F.R.D. 283, as analogous to the instant case, and declare that the only difference from the instant case is that the damages alleged were that plaintiffs had been forced out of business because they were not able to compete with the franchise dealers (appellants' brief, pp. 6-7). It is submitted that the factual situation alleged in Hathaway is far different from the instant case, as will be shown.

In Hathaway, the complaint was brought by former independent unfranchised (emphasis added) automobile dealers (the number was not designated) for treble damages against defendants General Motors, Ford Motor Company, the Chrysler group, and certain

"authorized" or franchised dealers (emphasis added), and others, and included finance companies such as G. M. A. C. It is important to note that in Hathaway the parties who were in the same position as appellants herein, were named defendants as being party to the exclusive dealing allegedly eliminating plaintiffs from competition, etc. None of those plaintiffs were present or former franchise dealers of any defendants.

The plaintiffs in Hathaway alleged in essence the following: (1) the rigid maintenance of a system of exclusive dealer franchises arbitrarily limited in numbers and location, which operated to exclude from the business of selling current model automobiles, those independents who would not submit and conform to the system; (2) that the system was maintained by careful policing, designed to restrain franchise dealers from selling to the independents; (3) that the system was supported by various pressures from banks, finance companies, newspapers and even legislatures; (4) that the system fosters and forces the tie-in sales of accessories and service at excessive prices; (5) that the public was deprived of free competitive pricing by control over retail prices, by the control of the manufacturers in new and used car sales; and, (6) that the plaintiffs therein were injured by not being able to compete with the franchise dealers.

The court then observed that, if the allegations were true, it might be, as a matter of fact, a situation where a would-be distributor is denied access to a source of supply because of the exclusive dealing contracts with others (not the plaintiffs) (emphasis

added).

This basic distinction in the instant case and Hathaway has eluded the appellants, but forecloses their right to complain of being damaged by "exclusive dealing arrangements". The crux of the Hathaway decision appears to be the court's holding that plaintiffs had at least alleged a sufficient complaint to prove "counscious parallelism" of the business activities of the various defendants.

Furthermore, the mere fact that parties to an agreement thereby eliminate competition among themselves is insufficient to condemn an agreement as violating Sections 1 to 7 of Title 15, if they must still seek competition in a fair market and neither seek nor are able to effect domination of prices. United States v. Swift Co., supra.

In any event, to make any comparison between the automobile industry and General Motors on the one hand, and the ladies' sportswear industry and Pauline's Sportswear, Inc. (even with the other defendants) on the other hand, is so patently unreasonable and untenable as not to have any bearing on the instant litigation. The differences in the industries and the competitive factors in the automobile industry (and General Motors' relationship to that industry) may give rise to a cause of action for an outsider who wants to purchase General Motors' products. The trial court in this matter obviously recognized the distinction between automobiles and General Motors (or perhaps oil and Standard Oil) on the one hand and ladies' clothing and the defendants on the other. The bald allegation that defendants are engaged in interstate commerce,

when controverted by an affidavit, and not further supported by appellants in any manner -- combined with obvious facts of which a court may take judicial notice (such as the presence of large and substantial manufacturers and retailers in women's clothing, e.g., department stores, specialty shops, etc., and the multitude of manufacturers) -- demonstrates that the appellants cannot prove a claim under the Federal anti-trust statutes.

The gravamen of an anti-trust action is the direct effect on interstate commerce, competition and public interests that the restraint has. Anti-trust cases, depend on the particular factual situation alleged. The necessity of pleading further than appellants elected to do in this case, has been enunciated in anti-trust cases. In the case of Feddersen Motors v. Ward (10th Cir. 1950), 180 F. 2d 519, it was held:

> ". . . and in a case (of this sort) seeking treble damages by individuals, it is essential that the complaint allege violations of the act in the form of undue restriction or obstruction of interstate commerce and damage to the plaintiffs (from those acts) proximately caused by the acts and conducts constituting the violation. But injury alone is not enough upon which to predicate the action. There must be harm to the general public in the form of undue restriction of interstate commerce, . . . and a general allegation of the forming of a conspiracy or combination with resulting injury to the

public is not enough. Details are not necessary, but the complaint must allege facts from which it can be determined as a matter of law that by reason of the intent, tendency or inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce." (emphasis added).

Further, the court held in Black and Yates v. Mahagony Assoc. (3rd Cir.), 129 F. 2d 227, that it is not enough to merely complain of an alleged violation in the words of the statute, but facts must be shown establishing the misconduct.

In the instant case, no facts are alleged showing a restraint on interstate commerce, a public injury, a conspiracy or an unlawful combination. In fact, it is obvious that competition in this field is at a peak and could hardly be more intense. The sum total of the allegations of the complaint herein simply fail to allege any facts upon which relief could be granted. Appellants have alleged the purported illegal agreement and sublease and "fear" of appellants if they violated said agreements and nothing more, other than conclusions, e.g., "the purpose (of which) was to lessen competition, create a monopoly, and harm the plaintiffs". The allegations simply fail to meet the test of the authorities cited.

Appellants cite the case of Nagler v. Admiral Corp., 248 F. 2d 319, as supportive of its position. This case, however, was a complaint by 13 retailers against 26 defendants in the New York

area, comprised of 24 suppliers and two retail chain stores. The essence of the plaintiffs' complaint therein was that the two retail chain stores received special pricing concessions from the other defendants, in which the 13 plaintiffs did not participate. This type of allegation does go to the heart of anti-trust matters, but is in no way similar to appellants' complaints. Appellants do not have or claim to have the same standing as plaintiffs in Nagler, and do not have the standing as a matter of law, under the anti-trust statutes, to complain as an injured party for damages allegedly due to their own exclusive dealings with appellees.

Appellants admit by their allegations that they entered into the contractual agreements with defendant Pauline's Sportswear, and would obviously be proper defendants -- if all other necessary elements to an anti-trust action were present -- to a claim by a third party that they could not buy or deal in appellee's merchandise. It is firmly established that licensees, who enter into license arrangements with price-fixing provisions with knowledge of the principal contract, are equally subject to prohibitions of Sections 1 to 7 (United States v. General Instruments Corp. (D. C. N. J. 1949), 87 F. Supp. 157). It is, of course, clear that an anti-trust action is an action in tort at law (not in equity). (Northwestern Oil Co. v. Sacony Vacuum Oil Co., 138 F. 2d 967, cert. denied, 321 U. S. 792; Weeks v. Baraco Oil Co., 125 F. 2d 84; Williamson v. Columbia Gas and Electric Corp., 110 F. 2d 15.) In the case of United States v. General Electric Co. (D. C. N. Y. 1949), 82 F. Supp. 753, the court held that licensees are equally

guilty with the licensor when there is a violation of the anti-trust statutes. It is apparent, therefore, that appellants would be in pari delicto with defendants if all of the elements of an anti-trust violation were present.

Appellants cite the case of Girardi v. Gates Rubber Co., 325 F. 2d 196 as contrary to this proposition. This case, however, did not deal with a franchise arrangement as in the instant case, but was a completely different factual situation, wherein a supplier simply refused to deal with plaintiff retailer.

The plaintiff Girardi complained that as a one-time distributor of certain products of one defendant, he was cancelled because he failed and refused to adhere and submit to the required maintained price set by the supplier with other distributors (also defendants). Moreover, the defendant supplier and manufacturer refused to sell Girardi any of his products, and Girardi alleged a conspiracy between the defendant manufacturer-supplier and other retail distributors to maintain the prices at a higher level than Girardi was willing and able to sell at. The court held that the fact that Girardi had adhered to the prices for some time prior to his cancellation did not bar him from now suing for damages incurred by reason of his cancellation of a distributorship and the refusal by the manufacturer-supplier to sell him any products. The Girardi court merely restated the law that concerted refusals by traders to deal with other traders, who refuse to submit to the required price maintenance -- where the public interest is involved, or interference with the natural flow of interstate commerce is directly affected

and there is a monopolistic tendency -- is forbidden. A "per se" violation of price fixing was applied in that case. In the instant case, the California Business and Professions Code, Section 16902(a), part of the fair trade act, makes legal, contracts fixing the resale prices of commodities in open competition. Certainly, women's clothing is in open competition. At any rate, the price fixing alleged in the instant case is not the price fixing that is condemned by the anti-trust laws, since appellants nowhere claimed damage because of not being able to sell below the prices suggested in the franchise agreement. It is obvious that the Girardi price fixing would injure the public because of Girardi's ability to sell at less than the suggested prices. In the instant case the only injury alleged is the plaintiffs' inability to make a profit at the suggested prices. Further, it is not alleged that appellees herein threatened or cancelled appellants, or threatened or refused to deal with appellants, individually or in concert with any other person or corporations; nor is it sufficiently alleged how the public interest is involved or injured, or interstate commerce affected or a monopolistic tendency created. Appellants' standing or allegations are simply not those countenanced or protected by the anti-trust laws.

A third principal case cited by appellants, P. H. Machinery Co. v. Harnischfeger Corp., 207 F. Supp. 392, is again remarkably not in point. The allegations of plaintiff's complaint, set forth at length therein, alleged the following facts:

Defendant manufactured construction, mining, logging, and

industrial equipment and parts to the mining, logging and industrial equipment industries, in substantial quantities. Defendant entered into a written non-exclusive dealership with the plaintiff for the sale and service of defendant's equipment -- including electric shovels. There was also alleged a representation by the defendant that plaintiff would get the parts manufactured by the defendant for the electric shovel, so that plaintiff could sell and replace the parts and service the equipment. It was further alleged that defendant refused to sell of transfer said parts to the plaintiff. It was also alleged that defendant continuously dealt with a competing distributor (Mesaba Service and Supply Co.) exclusively, for the purpose of eliminating competition and restraining trade and to acquire a monopoly, all proximately resulting in Mesaba being the sole supplier of electric shovel parts, and the sole supplier of electric shovel parts, and the sole agency to service replacement parts of defendant's electric shovels; and further alleging the public was injured by being denied the benefits of free competition between parts suppliers for electric shovels, including the elimination of plaintiff as a distributor of said parts.

Upon the recitation of such allegations in the complaint, the court then held that there was a genuine factual issue, in that more than an exclusive dealing had been alleged.

Nowhere in the instant case is it alleged (or as a factual matter could it be proved) that there was any refusal by defendants or even a threat of refusal to deal with plaintiffs. Nor are there other factual allegations as set forth in the Harnischfeger case.

Nor is the factual situation in any way analogous to the instant case.

In Harnischfeger, the causes of action are based on the claim of a third party or retailer who is injured by reason of the exclusive dealing between other retailers and distributors, manufacturers or suppliers allegedly conspiring to eliminate the third party retailer (plaintiffs therein) from competing with the named defendant retailer, or being able to handle the supplier's (defendant's) products.

It was obvious to the District Court that appellants herein have misconceived their standing under the statutes. By the taking of enunciations of general principals of law under the anti-trust statutes from the various cases, with which appellees have no quarrel, appellants do not bring themselves within the factual situations or similar factual situations to which these principals of law apply. They are the joint tortfeasor and nowhere do they allege any breach of the agreement or "refusal to deal" by the appellees. They have simply not stated a cause of action and could not.

Parenthetically, it is noted that even in the cases involving gasoline stations and tied-in products (discussed infra), there are no allegations, or complaints, based on the restriction, requiring the plaintiffs therein to sell only the defendant's gasoline. The complaints went to the necessity of selling only the tires, batteries and accessories supplied by or sponsored by the defendant gasoline company; nor, is any case cited by appellants wherein the plaintiffs complained of not being able to sell the competitor's gasoline, when they were the dealer for the defendant gasoline company. It is

patent that Standard Oil dealers sell only Standard Oil gasoline, Texaco dealers sell only Texaco gasoline, etc., and these are not violations of anti-trust statutes.

II

THERE WAS NO ILLEGAL TIE-IN BY THE USE OF SUBLEASES.

The various causes of action raised in appellants' second contention (p. 11, appellants' brief), being Counts 3, 6, 9 and 12 of the original complaint and 2, 5, 8 and 11 of the amended complaint, simply failed to allege sufficient factual basis as a matter of law to constitute an illegal tie-in prohibited by the anti-trust laws.

Neither the complaint nor the amended complaint sets forth facts sufficient to show an unlawful "tying arrangement", and fails to allege acts of any defendants as required in actions for treble damages (Feddersen Motors case and Black and Yates case, cited supra); but merely refers to alleged fear of plaintiffs of possible action by defendants without any factual basis. Appellants have cited no cases wherein the tying product is a lease, much less a sublease (since appellees did not own any of the real property involved). It must be noted that the other elements of an anti-trust action, e.g., restrictions on competition in interstate commerce and a detriment to the public interest are not alleged factually but only as a conclusion in the complaint and amended complaint.

Appellants cite Osborn v. Sinclair Refining Co., 324 F.2d 566, presumably to sustain its position of a lease as an illegal tie-in. In that case, the plaintiff claimed treble damages because, as a service station dealer, his dealership was cancelled by the defendants (not the lease). More in point, the tying product was gasoline and the "tied-in" products were tires, batteries, and accessories (TBA), whereby the competitors for TBA were unlawfully closed off from competition. It was found that defendant had sufficient economic power in the distribution and sale of gasoline to appreciably restrain competition in TBA, and a "not insubstantial amount of interstate commerce was affected". The plaintiff Osborn had his dealership cancelled because of his actual refusal to comply with defendant's demands concerning the tied products, TBA, and thereafter defendant acted affirmatively by cancelling his dealership. No specific issue was raised in said case as to the lease. The court in this Osborn case held that a prior appeal had already determined that Sinclair had an unlawful arrangement with its other dealers and plaintiff's refusal to abide by it caused defendant to cancel the plaintiffs (emphasis added). The only issue in this Osborn case cited by appellants was damages. In the instant case there is no allegation or facts pleaded to indicate a refusal by defendants to deal with plaintiffs, or even allegations of any threats (e.g. cancellation) or other facts upon which to base an action. It is perhaps unnecessary to cite the case of United States v. Colgate Co., 250 U.S. 300, which might have allowed defendants to refuse to deal with the appellants herein. Appellants restrict their pleadings

to reference to the provisions of the franchise agreement and sublease and their "fear" of breaching the agreements. There are no allegations of defendants' alleged "economic power" or any amount of interstate commerce affected. The allegation to the effect that defendants' competitors were restricted from dealing with appellants [T. 136, lines 15-19] is insufficient.

It is interesting to note that in the dissent in the Osborn case, Justice Haynsworth, while not disagreeing with the law of the majority opinion, noted that nothing in the anti-trust laws prevented the owners of real property from insisting that it be devoted to the lawful purposes of the owner, and further noted that defendants Sinclair had a right to cancel the lease, although the cancellation of the lease was not discussed in the majority opinion.

Appellees have not contended, nor need they, that a single trader is exempt from the application of the anti-trust laws. Appellants, however, are reaching beyond the scope of protection afforded under the anti-trust laws by the claim that 50 subleases, without any further details concerning location, area, space, desirability, uniqueness, etc., are a "tying product". They simply do not approach the minimum requirements of a "tying product", nor can 50 subleases be compared to the distribution of gasoline of a major oil company, e.g., Sinclair Oil (which had tied in with Goodyear tires, batteries and accessories to the exclusion of Goodyear competitors).

It must be shown on the face of the complaint that defendants had sufficient economic power, in connection with the alleged 50

subleases, to substantially affect interstate commerce, and thereby appreciably restrain competition in ladies' sportswear. An allegation to this effect was not made and obviously could not be claimed when consideration is given to all of the real estate available for retail store purposes in the State of California or the affected areas. It is obvious that 50 subleases in the State of California simply do not qualify as a tying product within the concept and limits of the anti-trust statutes.

Appellants next rely on Northern Pacific Railroad Co. v. United States, 356 U.S. 1, and quote on page 15 of its brief some of the law of that case, enunciating a basic principal with which appellees need not quarrel, to wit, that defendants must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and a not insubstantial amount of interstate commerce is affected".

The absence of any allegation by appellants herein of the economic power of defendants with respect to subleases (the tying product) causes the complaint to fail at that point. Moreover, the complaint does not allege any facts except the bald conclusion that there is an appreciably restraint to free competition and a substantial amount of interstate commerce is affected. By refusing to amend, it must be assumed that appellants have no factual basis upon which to make such allegations. Indeed, considering all of the commercial real property available for leasing and subleasing in California and the multitude of owners of said property, and the

various competitors in retail selling of ladies' clothing, all of which the District Court obviously took judicial notice as provided by law, no causes of action could be alleged.

It should be noted that in the Northern Pacific Railroad case, the unlawful activity was "preferential routing" by the defendant railroad. The factual situation therein is so distinct from the instant case that analysis is unnecessary. The court did, however, note by way of example an illustration which, it is submitted, is analogous to the instant case, to wit: "If twelve food stores in a community were to refuse to sell flour unless the buyer also bought sugar, it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour (alone) by themselves." In the instant case, there was (and could be) no claim from a factual basis that competitors of appellants or appellees were not fully able to sell ladies' sportswear without a leasing arrangement.

Finally, appellants rely on Lessig v. Tidewater Oil Co., 327 F. 2d 459, which case was reversed because of error in jury instructions regarding damages, and was again a case of tying product being gasoline and the tied product being tires, batteries and accessories, sold or sponsored by Tidewater Oil Co. The court enunciated the principal that the defendant Tidewater Oil Co. had to have sufficient economic power over the tying product (gasoline) to impose an appreciable restraint on free competition (in interstate commerce) and the tied product, and held that the power may be inferred from the tying product's desirability to consumers or from the uniqueness of it. In Lessig, plaintiffs

alleged the following facts: (1) That defendant conspired to control resale prices of the dealers and steadily increased wholesalers prices though the retail prices dropped several times; (2) Defendants threatened to terminate and did terminate (emphasis added) dealerships that did not comply with the retail suggested prices; and (3) Plaintiff was given a three-day notice of a lease termination after he refused to comply with defendant's resale prices in the district. It was further alleged by the plaintiffs that the dealers had to sell the tied products, TBA, sold or sponsored by defendant in order to obtain the gasoline and oil products of defendant, and would receive such products only if the dealers would not do business with competitors in TBA. Defendants inspected the dealer stations and threatened non-renewal of the dealership if the competitor's items were not returned. The dealers were on one year leases, and defendant had 2,700 service stations in eight western states, and sold 310 million gallons of gasoline and $4 million to $5 million of TBA.

The court held that this was sufficient pleading to base a factual finding as to whether or not all of the defendant's activity "substantially lessened competition or tended to create a monopoly in a line of interstate commerce". The court enunciated the acknowledged principal that the amount of "economic power" over the tying product (here, allegedly the subleases), prerequisite to a violation, is "sufficient economic power to appreciably restrain free competition on the tied product" (here, women's sportswear). This power may be inferred from the tying product's desirability

(emphasis added) to consumers, or from the uniqueness. It is apparent that there is virtually no consumer desirability or uniqueness in 50 subleases and the analogy thereof to gasoline as a tying product is torturing the intent of the law beyond its limits.

III

AS A MATTER OF LAW, THERE IS NO CLAIM UNDER CLAYTON ACT III.

Appellants cite the case of Standard Oil of California v. United States, 337 U.S. 293, but have failed to plead facts which would bring it within the standards and requirements set by said case.

That court did not overrule the law of United States v. Winslow, 227 U. S. 202, 33 S. Ct. 253, and United States v. U. S. Steel, cited supra, which held that exclusive dealing arrangements, normal, usual and customary business practices, as in the case of manufacturer or distributor acquiring control of the outlets preventing the outlets from buying other products, and where the manufacturer could not sell to other outlets, are lawful and are not illegal. The Standard Oil case did not reverse or lessen the effect of this pronouncement. The court held that where $68 million of Standard Oil business (before 1948) was involved, an unreasonable restraint on interstate commerce was created. And an exclusive dealing arrangement therein might have the effect of substantially lessening competition and foreclosing a substantial share of the line of

commerce affected. Then a violation might occur if there had been a public injury.

In the instant case, there are no factual allegations upon which a claim of monopoly is based, and appellants do not have the standing to claim an injury by an alleged monopoly of which they would necessarily be a part. Again, the naked comparison of the Standard Oil Company with defendants and the oil industry to women's sportswear, without further specific acts pleaded, in the light of the obvious competition from various department stores, five and dime stores and other retail outlets, was patently considered by the District Court. Less than $1 million of total sales by appellees in the ladies' sportswear business is not comparable to $68 million of sales of Standard Oil Company in a given area (prior to 1948). Appellants did not allege (and certainly could not prove) unreasonable or arbitrary restrictions on competitors of appellees, and it is obvious that defendant's entire operation does not substantially lessen competition or tend to create a monopoly or foreclose a substantial share in a line of interstate commerce.

In such cases as Cane v. Chrysler (D. C. Del.), 80 F. Supp. 360, the court upheld exclusive dealership arrangements, noting that "the dealers are not misled or imposed upon but accept as nonetheless advantageous an agreement, . . . which in fact may be onesided. . . . Franchises have been developed to meet the distribution needs of manufactured products. The dealer must make a considerable investment with uncertain results and the contracts are entered into in good faith by both parties and utilized

commerce affected. Then a violation might occur if there had been a public injury.

In the instant case, there are no factual allegations upon which a claim of monopoly is based, and appellants do not have the standing to claim an injury by an alleged monopoly of which they would necessarily be a part. Again, the naked comparison of the Standard Oil Company with defendants and the oil industry to women's sportswear, without further specific acts pleaded, in the light of the obvious competition from various department stores, five and dime stores and other retail outlets, was patently considered by the District Court. Less than $1 million of total sales by appellees in the ladies' sportswear business is not comparable to $68 million of sales of Standard Oil Company in a given area (prior to 1948). Appellants did not allege (and certainly could not prove) unreasonable or arbitrary restrictions on competitors of appellees, and it is obvious that defendant's entire operation does not substantially lessen competition or tend to create a monopoly or foreclose a substantial share in a line of interstate commerce.

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by businessmen and must be given a construction in accordance with the intention of the parties. Each party suffers a detriment and hopefully and advantage."

Even in such an industry as steel, the court held in the <u>United States v. Columbia Steel Co.</u>, 334 U.S. 495, 68 S. Ct. 1107,

> "The legality of contractual agreements for exclusive dealing has been sustained by the Supreme Court. Exclusive dealings brought about by vertical integrations, or otherwise, are not illegal, at any rate until the effect of such control is to <u>unreasonably restrict</u> the opportunities <u>of competitors to market products.</u>" (emphasis added).

The court noted that the dealer could cancel his contract and was under no duty to execute the contract in the first place. In the instant case it is clear that there is a fair market in ladies' sportswear and that the combination of appellants and appellees is virtually no factor in interstate commerce or in California commerce, bringing the appellees well within the limits of the many cases such as <u>United States v. Swift</u> and others heretofore cited.

There is no allegation herein that appellees intended to or were able to dominate prices or peg them artificially <u>high</u> against appellants' wishes. If the prices were pegged artificially low, it might be competitors of appellants who could complain, not the appellants themselves.

Where the outlet is restrained and prevented from buying

other's products (even automobiles), and other manufacturers cannot sell to the defendants' dealers, it was held (United States v. Winslow, cited supra) that such restraints were not frowned upon by the law but are common and inherent in the acquisition by a manufacturing company of outlets, regardless of whether the manufacturer creates the outlets or acquires an exclusive agency arrangement, and their legality has long been recognized. The control over branches and goods sold to branches -- even branches that are controlled by an exclusive arrangement with a distributor or manufacturer -- is not violative of the anti-trust laws, unless there is a substantial lessening of competition or the creation of a monopoly in a line of commerce. Donovan v. Pennsylvania Co., 199 U. S. 279, 26 S. Ct. 91. Also F. T. C. v. Curtiss Publishing Co., 260 U.S. 568. Even in cases involving Standard Oil such as United States v. Griffith, 334 U.S. 100, 68 S. Ct. 941, it has been held that there must be harm to the public and this is gauged by the effect of the practice on the free flow of goods in interstate commerce and the maintenance of competition in the field. There is no factual basis pleaded in the instant complaint indicating or claiming any alleged interference with the free flow of goods in interstate commerce or the maintenance of competition in the field of ladies' sportswear; nor, are there facts pleaded therein from which such an inference could be drawn.

Even in cases of the automobile industry, where there are (at the time of the decisions) less than a half dozen major manufacturers and suppliers, exclusive dealing has been upheld. Ford v.

Boone (C. C. A. 9th Cir.), 244 Fed. 335; Webster Motor Car Co. v. Packard Motor Car Co., 135 F. Supp. 4, reversed on other grounds, 243 F.2d 418.

IV

APPELLANTS HAVE NOT STATED A CLAIM OF A FACTUAL TRIABLE ISSUE UNDER THE SHERMAN ACT, SECTION II.

Appellees, having thoroughly discussed the pertinent cases, including Lessig v. Tidewater Oil Co., in preceding sections of this brief, will not restate or belabor the points made. Attention must again be drawn, however, to the defect in appellants' complaint of failing to allege any facts other than the wording of the statute, which is clearly insufficient. Moreover, a court can take judicial notice of certain basic factors, not the least of which is the inability of two virtually unknown companies (Robert and Desda Abild being the sole owners of appellee Pauline's Sportswear, Inc.) to monopolize or meaningfully attempt to monopolize interstate commerce in ladies' sportswear. Appellees should not be put to the burden and expense of further defense of a charge of monopoly and conspiracy on the wording of the statute. The basic purpose of the anti-trust laws and the Sherman Act sections is to preclude a large buyer from securing an advantage over a small buyer. In the instant case appellants at first attempted to gain the advantages of being part of a large organization, and at no time were they victimized by any alleged monopoly of defendants, in violation of

anti-trust laws. If appellees, with their franchisees, had ever actually attained a monopoly by virtue of an unlawful conspiracy, would not the appellants be defendants in an anti-trust action based on the same alleged violations of the Sherman Act upon which they now seek to sue? These laws were enacted for the protection of competitors to those in a situation similar to appellants', and not for the purpose of appellants entering into an agreement fully voluntarily without any coercion whatsoever and then claiming that the very agreement that they signed gives them a cause of action against the appellees. There is not in this case, a situation where after the agreements were signed, appellees then attempted to foist or force some additional conditions, restrictions or restraints on appellants. Nor, did defendants refuse or threaten refusal to deal with them (as in some of the cases relied upon by appellants).

Appellees need not quarrel with any of the law cited by appellants, but in Lessig v. Tidewater it must be noted that the tied product, TBA, was brought in after the execution of the agreements between plaintiff and defendants, and were not part of the agreements originally signed by the complaining dealers. Again, the analogy between Tidewater Oil attempting to monopolize a portion of the market was based on factual allegations. Appellants' quotation from said case appearing on page 22 of appellants' brief was dictum to the decision in that case, which, as already pointed out, was reversed because of an error instructing the jury concerning damages. Indeed, nowhere have appellants cited any authoritative case supporting the adequacy of their pleadings or attempted causes

of action, but have relied throughout on dicta and general statements of the law. This is evidenced by the citation of the Alcoa and Times Picayune cases. Certainly, the intent to violate Section II may be implicit in monopolistic conduct as it applies to Alcoa or others of its stature; but, appellants failed to allege any facts of monopolistic conduct on the part of appellees other than the execution of the franchise agreement and sublease.

The Times Picayune case fails to support appellants' position. In that case, the United States challenged a unit advertising contract arrangement by defendant whereby the defendant required would-be advertisers in one of its two papers to advertise in both its papers (a morning and evening paper) and would not accept ads in one paper only. Again the naked charge that two defendants (in substance) combined and conspired to unreasonably monopolize or attempt to monopolize a part of trade or commerce among the several states in the distribution of ladies' sportswear is so patently inadequate a pleading as to demand the District Court to dismiss the causes of action, in light of the cases and the clear competition in said field. Even if this case were dealing with some esoteric or sophisticated product not generally known to the public, e. g., an electronic part or machine (or of which the court could not take any judicial notice as to the product or the field of commerce), appellants would have had to allege more facts upon which to base their claim of monopoly, conspiracy, and other violations.

CONCLUSION

It, of course, was not necessary for the District Court to enunciate every ground upon which the dismissal was granted. If the causes of action have been plead insuffciently, so as not to state causes of action as required; or the parties plaintiff are not proper parties to sue under the statutes, the District Court decision must be affirmed. This is particularly true where appellants fail to attempt to plead further factual allegations when not foreclosed from doing so by the District Court.

Women's clothing or the women's sportswear industry is not comparable to gasoline, automobiles or automobile accessories, aluminum, steel or any industry where there are less than one-half dozen dominant manufacturers or suppliers -- nationwide or in a given area -- and where interstate commerce is obviously affected and public injury apparent by the very defendants designated and the allegations of facts in the complaints. Simple restrictions on dealing with competitors, franchising in general, and alleged personal injury to a franchisee are not sufficient allegations.

In anti-trust cases, as perhaps in no other field of law, the pleadings must on their face show facts sufficient to constitute a cause of action, and cannot be stated merely in legal conclusions in the words of the statute, e.g., "tend to create a monopoly", "unlawful tie-in", etc.

It is not by accident that the authoritative cases in anti-trust litigation involve the dominant companies in industries in

[illegible]

[illegible]

[illegible]

[illegible]

which there are a limited number of major companies. The District Court could not ignore the presence of Sears, Penney's, Newberry's, Woolworths, Thrifty Drug Stores, Broadway Hale Department Stores, May Co. and the host of other stores selling women's sportswear, and the multitude of companies or individuals manufacturing and supplying merchandise. To compare 50 subleases in the State of California to the sale of gasoline of a major oil company is patently absurd.

Indeed, appellants concede that it would be a most difficult case to try. It is submitted it is a needless case to try, certain to fail of proof on all counts. The District Court was fully informed of appellants' claimed position and appellants cited most of their authorities to that court. It is submitted the District Court recognized a burdensome, wasteful and nuisance claim, brought by improper parties, failing on all counts to state causes of action. Said court's decision should be affirmed and appellees awarded costs and attorney's fees.

Respectfully submitted,

THOMAS H. GREENWALD

By: THOMAS H. GREENWALD

Attorney for Appellees.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Thomas H. Greenwald
THOMAS H. GREENWALD